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**BY E-FILING**

Ms. Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
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395 E Street, S.W.  
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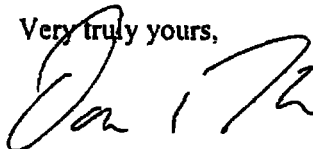
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**Re: Canadian National Railway Company and Grand Trunk Corporation –  
Control – EJ&E West Company [Barrington Petition for Mitigation] (Docket  
No. FD 35087 (Sub-No. 8))**

Dear Ms. Brown:

Enclosed for filing in the above referenced sub-docket please find CN'S (1) Reply to Motion of Village of Barrington for Leave to File Rebuttal to CN's Reply to Petition Seeking Imposition of Additional Mitigation and (2) Response to Barrington Rebuttal (designated as CN-2).

Very truly yours,



David A. Hirsh  
Counsel for Canadian National Railway Company  
and Grand Trunk Corporation

Enclosure

cc: Richard H. Streeter, Esquire (by e-mail)

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Docket No. FD 35087 (Sub-No. 8)**

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**CANADIAN NATIONAL RAILWAY COMPANY  
AND GRAND TRUNK CORPORATION  
- CONTROL -  
EJ&E WEST COMPANY**

**[Barrington Petition for Mitigation]**

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**CN'S (1) REPLY TO MOTION OF VILLAGE OF BARRINGTON FOR LEAVE TO  
FILE REBUTTAL TO CN'S REPLY TO PETITION  
SEEKING IMPOSITION OF ADDITIONAL MITIGATION AND  
(2) RESPONSE TO BARRINGTON REBUTTAL**

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Docket No. FD 35087 (Sub-No. 8)**

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**CANADIAN NATIONAL RAILWAY COMPANY  
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**[Barrington Petition for Mitigation]**

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FILE REBUTTAL TO CN'S REPLY TO PETITION  
SEEKING IMPOSITION OF ADDITIONAL MITIGATION AND  
(2) RESPONSE TO BARRINGTON REBUTTAL**

On October 14, 2011, Barrington filed its Petition asking the Board to require CN to spend tens of millions of dollars on an underpass as an additional condition to the Board's approval of CN's EJ&E Transaction, which was consummated on January 31, 2009. CN filed its Reply on November 3, 2011. On November 14, 2011, Barrington filed a motion seeking leave to file 35 pages of "brief rebuttal" to CN's Reply ("Rebuttal").

Barrington's Rebuttal is a forbidden reply to a reply, and its request for leave to file that Rebuttal should be denied. If it is granted, CN should be allowed to complete the record with the response below, which demonstrates that Barrington's Rebuttal is, like its Petition, without merit.

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<sup>1</sup> Because this document is being filed in a separate sub-docket, it is designated as CN-2, to reflect its sequential numbering in that sub-docket. CN's November 3, 2011, Reply to the Petition, formerly designated as "CN-65," may be referred to as "CN-1" in this sub-docket. Capitalized terms and abbreviations herein, if not otherwise defined, have the same meaning as in CN's Reply.

### **RESPONSE TO REQUEST FOR LEAVE TO FILE REPLY**

The Board's rule is clear: "A reply to a reply is not permitted." 49 C.F.R. § 1104.13(c). This rule embodies the Board's longstanding policy of securing efficiency and fairness by giving a petitioner one opportunity to make its case and its opponent one opportunity to respond. That policy has particular force here, where the underlying Petition sought to reopen and revisit issues and arguments that have been repeatedly reviewed and resolved.<sup>2</sup>

Barrington offers two meritless arguments for an exception to the Board's rule. First, it argues that CN's Reply to the Petition was "wrong" and "misleading." Rebuttal at 1. That argument signifies nothing more than Barrington's continued disagreement with CN – principally on points of law. Disagreement between opposing parties is normal, not exceptional, and an asserted need to correct alleged "misstatements" is not an adequate basis for an otherwise prohibited reply to a reply. *See, e.g., Peter Pan Bus Lines, Inc. – Pooling – Greyhound Lines, Inc.*, Docket Nos. MC-F-20904, MC-F-20908, and MC-F-20912, slip op. at 3 (STB served Apr. 20, 2011).

Second, Barrington argues that it should be permitted an exceptional reply to a reply in order to correct its traffic delay analysis to reflect the fact that, contrary to Barrington's earlier assumption, the gates at CN's rail-highway at-grade crossings in Barrington use constant warning time ("CWT") technology. Rebuttal at 1. That correction did not require 15 pages of briefing and a 20-page verified statement. Nor did it help Barrington's case. Since CWT technology shortens the time gates are down at railroad crossings, factoring it in can only further weaken Barrington's claim that the Board underestimated post-Transaction traffic delays.

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<sup>2</sup> As CN demonstrated, Barrington's Petition also violated the Board's page limits and other procedural requirements for a petition for reopening. *See* Reply at 7 n.15.

Accordingly, there is no reason why the Board should not enforce its rules and decline to accept Barrington's reply to CN's reply. Alternatively, if the Board grants Barrington leave to file its Rebuttal, CN respectfully requests that the Board likewise accept CN's response below. Consistent with fairness and the Board's rules, under which the respondent has the last word, CN should be afforded the right to respond to Barrington's further arguments and its allegedly new evidence, and to close the record in this proceeding.

## **RESPONSE TO BARRINGTON REBUTTAL**

### **INTRODUCTION**

In its Final Decision, the Board carefully weighed various public interest considerations, and specifically concluded, for multiple reasons, that requiring CN to fund a grade separation at Barrington was not justified. There has been no material change in the factors the Board considered.

There is now, however, an important additional public interest that weighs against Barrington: the public interest in according the parties to a transaction the finality to which they are entitled. Barrington asks the Board to ignore "alleged administrative finality" based on FMC 72, Rebuttal at 13, but, since Barrington has shown no material changes to the facts and circumstances since the Board's Final Decision, FMC 72 does not apply. Accordingly, Barrington must meet the Board's well-established standards for reopening under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4. It cannot do so because it has no material new evidence and cannot demonstrate material error.

Barrington's claim of error is grounded in its assertion of "disparate treatment." It claims that the traffic and crossing conditions at Northwest Highway (U.S. Route 14) in Barrington are "indistinguishable" from those at Ogden Avenue (U.S. Route 34) in Aurora and

Lincoln Highway (U.S. Route 30) in Lynwood, and that the same mitigation – a grade separation – should be required at Northwest Highway as at those crossings. Rebuttal at 10-11.

As we explain further in Section III, below, Barrington's belated assertion of "disparate treatment" is unfounded. The crossing at Northwest Highway was thoroughly analyzed by SEA on the same basis as all other crossings.<sup>3</sup> That analysis showed that, contrary to Barrington's assertions, Northwest Highway was readily distinguishable both from Ogden Avenue and Lincoln Highway, the two crossings where the Board imposed grade separation conditions, and from Woodruff Road and Washington Street, both in Joliet, the two crossings for which the Board indicated it might have imposed such a condition but for CN's voluntary mitigation agreement ("VMA") with the City of Joliet:

- Unlike Ogden Avenue and Lincoln Highway, Northwest Highway fell far short of the Board's total vehicle-train exposure criterion, which reflects accident risk.<sup>4</sup>
- Unlike the Joliet crossings, Northwest Highway failed to meet the Board's criterion for diminished roadway crossing level of service ("LOS"), which reflects delays and congestion directly caused by crossing gates being down.<sup>5</sup>
- The Ogden Avenue, Lincoln Highway, Woodruff Road, and Washington Street crossings will each experience, post-Transaction, a far greater total number of trains, and a far greater additional number of trains than the Northwest Highway crossing.<sup>6</sup>

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<sup>3</sup> Indeed, the only "disparate treatment" SEA gave Barrington was favorable: after doing the same traffic analysis for Barrington as for other locations, SEA, at Barrington's request, took an extra "hard look" at Barrington's traffic issues in its supplemental Village of Barrington Traffic Operational Analysis ("VOBTOA").

<sup>4</sup> The Board's criterion for total exposure was 1,000,000. Compare total exposure at Northwest Highway: 689,165, with Lincoln Highway: 999,905; and Ogden Avenue: 1,821,345. See FEIS App. A.11, at 439-441 (total exposure is the product of the average daily traffic ("ADT") and trains per day shown). Civiltech's projection of reduced vehicular traffic growth in its 2011 Study, 2011 Study at 10 & Table IX-1, would further reduce Northwest Highway's exposure to 623,210.

<sup>5</sup> Compare Northwest Highway: unchanged at LOS A (free flowing), with the Joliet crossings (Washington Street: declining from LOS A to LOS F (severely congested); Woodruff Avenue: declining from LOS B (reasonably free flowing) to LOS F). FEIS App. A.11, at 439-40.

Thus, even if post-Transaction vehicle delay at Northwest Highway were comparable to that at the four other crossings Barrington asserts are analogues,<sup>7</sup> Barrington was not given disparate treatment. Its circumstances were simply different and they did not warrant a grade separation funding condition under the criteria employed by SEA. Accordingly, Barrington has failed to show any error by the Board – much less material error sufficient to merit reversing, three years after the fact, the Board’s Final Decision not to impose a grade separation requirement at Barrington. Barrington’s Petition should be denied.

## **ARGUMENT**

### **I. BARRINGTON CANNOT BRING ITS PETITION WITHIN THE SCOPE OF FMC 72 OR OTHERWISE ESCAPE THE IMPLICATIONS OF ADMINISTRATIVE FINALITY.**

Barrington argues that FMC 72 provides for the Board to reconsider its Final Decision based on its allegation, years later, of material error, Rebuttal at 2-5, or its proffer of “newly available evidence” in the form of a study that purports to show that the Board was guilty of “disparate treatment” three years ago, *id.* at 6-11. And, based primarily on that argument, Barrington claims that the Board should ignore the “alleged administrative finality” of its own Final Decision. *Id.* at 12-13.

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<sup>6</sup> Compare Northwest Highway: 20.3 trains/day (up 15), with Ogden Avenue: 39.5 (up 23.8); Lincoln Highway: 34.2 (up 24); Woodruff Road: 42.3 (up 23.8); and Washington Street: 28.3 (up 21.9). FEIS App. A.11, at 439-441.

<sup>7</sup> In fact, the FEIS projects post-Transaction total hours of vehicle delay for Northwest Highway (31.8) that are far less than at each of these four crossings (Ogden Avenue (73), Lincoln Highway (50.6), Woodruff Road (156.3), and Washington Street (164.7). FEIS App. A.11, at 439-441. And even the updated 2011 Study by Barrington’s consultant, Civiltech (which, using its broader measure, projected total hours of vehicle delay related to Ogden Avenue, but not for the other three supposedly comparable crossings), projects total hours of vehicular delay for Ogden Avenue (114) to be 16% greater than for Northwest Highway (98). Andres S.V.S. at Attachment 1.

Barrington ignores the plain meaning of FMC 72. By its terms, it applies in cases of “material change in the facts or circumstances upon which the Board relied in imposing specific environmental mitigation conditions.”<sup>8</sup> It is not triggered by merely new arguments or new studies about facts and circumstances that were before the Board or could have been presented to the Board before its Final Decision. Barrington’s statement that “CN has not cited any precedent that supports its contention that the Board is precluded from reviewing allegations of material error [under FMC 72],” Rebuttal at 3, misses the point: no precedent is necessary to prove that the Board meant what it said when it reserved the power to respond, after its Final Decision, to materially changed facts or circumstances. Barrington also errs in claiming that CN’s interpretation of FMC 72 renders it “illusory.” Rebuttal at 13. FMC 72 serves a significant function by ensuring the Board’s ability to preserve the effectiveness of its decision against a subsequent “material change in the facts or circumstances upon which the Board relied.” But it does not negate the “alleged administrative finality” of the Board’s Final Decision. The Board did not provide in FMC 72 that it may simply change its mind about matters settled by its Final Decision.

Accordingly, since Barrington can demonstrate no materially changed facts or circumstances upon which the Board based its mitigation conditions that have arisen since the

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<sup>8</sup> Barrington relies on a footnote in CN’s Reply to construct a straw man. Rebuttal at 2-3. CN pointed out that FMC 72, by its terms, is focused on the effectiveness of the “specific conditions” the Board imposed, not on wholly new conditions. But the distinction between imposing new conditions and adjusting existing conditions is not the critical one here. Rather, FMC 72, by its terms, is triggered by changed facts or circumstances.

Barrington makes another straw-man argument when it claims that CN’s interpretation of FMC 72 hinges on whether the additional condition sought by Barrington is “substantial.” Rebuttal at 5. It does not: regardless of the stakes, FMC 72 is not triggered absent material changed facts or circumstances.



Final Decision,<sup>9</sup> it must otherwise satisfy the Board's requirements for reopening under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.4. And, in considering Barrington's Petition, the Board should give substantial weight to the public and equitable interests associated with the very real administrative finality of its Final Decision. When CN invested hundreds of millions of dollars in the Transaction and related environmental improvements, to the benefit of the public, it reasonably relied on the finality of that decision, subject to the changed facts or circumstances caveat with respect to mitigation conditions in FMC 72. CN's reliance interests should be honored, the orderliness and efficiency of the Board's procedures should be protected, and Barrington's efforts to make arguments on reopening that could have been made earlier should be discouraged. The Board can achieve all of those public goals by enforcing its well-established reopening standards, which Barrington does not meet.

## **II. BARRINGTON HAS PROVIDED NO NEW MATERIAL EVIDENCE.**

Barrington argues that the Board's Final Decision imposing grade separation conditions at Aurora and Lynwood makes its claim of "disparate treatment," and any evidence bearing on that claim, "newly available." As discussed in CN's Reply (at 12-15) and elaborated upon in Section III, Barrington's evidence is not material to the question of whether the Board erred in determining not to impose a condition requiring the funding of a grade crossing in Barrington. In addition, as discussed in this section, Barrington's comparisons between Aurora and Barrington are not "new" in any relevant sense.

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<sup>9</sup> Barrington notes that FMC 72 may also be intended to address "operational problems that arise after the transaction" (Rebuttal at 2). The focus of Barrington's Petition, however, is not problems that have arisen, but future projections. Therefore, its Petition does not implicate any such aspect of FMC 72.

Barrington's claim that its VISSIM-based traffic delay comparison between Aurora and crossings in Barrington is "newly available evidence" makes no sense. Barrington made traffic delay arguments based on the same study methodology in 2008, and could have performed the comparison then.

Barrington also claims that it did not realize the comparison's importance until it saw that the Board's Final Decision (i) used traffic delay as a factor in deciding whether to impose grade separation requirements, and (ii) imposed such a grade separation requirement at Aurora but not at Barrington. Rebuttal at 6-11. But that is beside the point. Barrington always had its traffic data and the same modeling software "available," regardless of how well it anticipated the Board's decision and when it identified what it now claims are its best arguments. In any event, Barrington was fully aware of the importance of absolute and comparative traffic delay before the Final Decision, and it made arguments on that basis before issuance of the Final Decision. BARR-6 at 14-15, 34-40.

Barrington also had ample opportunity immediately after the Board's decision to complain of alleged "disparate treatment" in the Board's Final Decision through a timely petition for reconsideration or on appeal before the D.C. Circuit. As a result of its own litigation choice in court, it did not timely raise and was thus found to have waived its 2008 Study evidence. *Village of Barrington v. STB*, 636 F.3d 650, 672 (D.C. Cir. 2011). And it implicitly concedes that it made a tactical decision – in order to minimize costs – not to present its arguments in a timely petition for reconsideration. Rebuttal at 9. Barrington's further implicit argument that it lacked sufficient time to produce comparative evidence for a petition for reconsideration also rings hollow because the information required to do so was available in 2008 and, at a minimum, Barrington could have timely challenged the scope or meaning of the VOBTOA study presented

in the FEIS, and on that basis either asked the Board to perform additional studies or asked the Board for additional time for Barrington to do so itself. It did none of these things.

Barrington's failure until now to complete and submit a study that it could have completed three years ago does not entitle it to be treated as if it had material new evidence.

**III. BARRINGTON HAS NOT SHOWN THAT IT RECEIVED "DISPARATE TREATMENT" IN THE ANALYSIS OF RAILROAD GRADE CROSSINGS OR THAT THE BOARD OTHERWISE COMMITTED MATERIAL ERROR.**

CN's reply demonstrated that Barrington's Petition did not and could not demonstrate material error. CN Reply at 16-18. In response, Barrington claims that the crossing at Northwest Highway in Barrington is "indistinguishable" from the crossings at which the Board ordered (or indicated that it might have ordered) grade separations, Rebuttal at 10-11, and that its revised study of traffic delay "conclusively demonstrate[s] and prove[s]" that Northwest Highway received "disparate treatment" as compared to those crossings, *id.* at 10. Barrington's claims are unfounded.

SEA performed the same traffic delay analysis on the crossings in Barrington as it did for every other crossing on the EJ&E arc: it used its established formulas to estimate (1) crossing and roadway LOS,<sup>10</sup> (2) queue length,<sup>11</sup> (3) average delay per delayed vehicle, and (4) total

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<sup>10</sup> The criteria for and descriptions of LOS are provided by the Highway Capacity Manual ("HCM"). LOS is a measure of quality, describing operational conditions within a traffic stream generally in terms of such service measures as speed and travel time, freedom to maneuver, traffic interruptions, and comfort and convenience. HCM at 2-2. LOS is expressed as a letter grade ranging from LOS A (free flowing) to F (severely congested) and is measured quantitatively by the average delay for all vehicles. Each LOS designation is also intended to reflect and describe qualitatively the user's perception of the operational conditions within the traffic stream. *Id.* at 2-3. Thus, LOS encompasses both quantitative and qualitative elements. As used by the Board, LOS at a grade crossing is focused on impacts, measured over 24 hours, on vehicles that are delayed because the gates are down due to a train moving through the crossing. It focuses on the actual impacts on vehicular traffic caused by the presence of trains at

vehicular delay in a 24-hour period. *See* DEIS at 4.3-9 *and* Table 4.3-4. SEA consistently applied the results of these analyses to every crossing on the EJ&E arc, including those in Barrington. And SEA took a consistent approach to other factors that SEA and the Board considered relevant to whether and what mitigation was warranted at a particular crossing. For example, SEA used an established FRA methodology to estimate accident frequencies at every EJ&E crossing, as well as a Federal Highway Administration method for estimating safety impacts at each EJ&E crossing. DEIS at 4.2-13 to 4.2-19. Thus, when SEA and the Board were determining whether and where to impose mitigation, the crossings in Barrington were reviewed on exactly the same basis as every other EJ&E crossing: they had been analyzed using the same objective formulas and were subject to the same objective criteria for consideration for mitigation. Based on the results of that analysis, SEA recommended – and the Board agreed – that a grade separation funding condition was not warranted in Barrington.

Not satisfied with this result, Barrington requested that it be treated differently. Asserting that its particular roadway configuration required a different, more complex analysis than every other location on EJ&E, Barrington requested that SEA perform an additional, more detailed study, solely for the crossings in Barrington. SEA complied, and prepared a supplemental study for the Barrington area: the VOBTOA.<sup>12</sup> SEA and the Board thus took a particularly “hard look” at Barrington, more than meeting the Board’s NEPA obligations, and SEA and the Board reasonably concluded, based on that “hard look” and the Board’s objective criteria, that

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an at-grade crossing. The Civiltech analysis did not purport to measure LOS at any of the rail crossings in Barrington.

<sup>11</sup> The Board calculated the length of an average queue of vehicles stopped at a crossing to permit a train to pass. If the queue would be long enough to block a major thoroughfare, the Board deemed the crossing to be “substantially affected.” FEIS at 2-32.

<sup>12</sup> FEIS App. A.5.

Barrington merited mitigation in the form of signage, but not an underpass (or other grade separation).

At the root of Barrington's Petition is its 2008 argument that SEA under-estimated projected traffic delays in Barrington. Based on Civiltech's questionable higher traffic delay projections,<sup>13</sup> Barrington claims in its Rebuttal that the case for a grade separation at Northwest Highway is "indistinguishable" from the two crossings where the Board imposed grade separation conditions.

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<sup>13</sup> Even if traffic delay were all that mattered, Civiltech's analysis raises too many questions and is too dependent on too many debatable (and not fully disclosed) assumptions to serve as a premise for a claim that the Board materially erred. There are pros and cons to different traffic analysis methodologies, but the study and criteria used by the Board in the EIS provide direct and objective measures of Transaction impacts that are comparable crossing-to-crossing. In contrast, as exemplified by Civiltech's adjustment for its error concerning CWT, its study is highly sensitive to and dependent on its data inputs, model, and other assumptions – inputs that Barrington has now failed twice to fully explain, justify, or document.

Mr. Andres's responses to the points raised in CN's Reply underscore the apparent bias and unreliability of his study. Mr. Andres admits that the Civiltech analysis did not use observed pre-Transaction EJ&E train speeds (of between 16 and 24 mph) when calculating the delay in the No-Action Alternative. He dismisses those observed speeds based on his undocumented claim that some of the observed trains were for maintenance and some unidentified person "believed" that maintenance operations contributed to slower than normal observed speeds for all trains. But that cannot excuse Civiltech's failure to observe EJ&E's pre-Transaction speeds at other locations or at other times, and it certainly does not justify Civiltech's use of much greater FEIS model speeds, particularly given Civiltech's additional unjustified choice to reject use of those same FEIS model speed projections for CN's post-Transaction 2015 traffic. Barrington's choice to have Civiltech model increased EJ&E pre-Transaction speeds but reduced CN post-Transaction 2015 speeds (using lower 2011 "observed" speeds instead of appropriate 2015 projections), thereby increased delay attributable to the Transaction by effectively assuming that CN's many improvements to EJ&E would result in train speed decreases rather than increases. The choice of train speed is a critical input into the model, since the difference in gate down time caused by a 2,800 foot train moving at 24 mph (the highest recorded pre-Transaction EJ&E train speed) and 38 mph (the train speed used in the Civiltech Study) is 30 seconds. Given the large effect on total delay time caused by the relatively minor adjustment to CWT, a change of 30 seconds per train event would likely have a major impact on delay estimated in the No-Action Alternative. Consistency of approach is critical to unbiased modeling – in this and other respects discussed in CN's Reply, Civiltech's study fails that test.

The record shows, however, that, regardless of the accuracy of SEA's traffic delay projections, SEA and the Board determined that vehicular delay alone was not a sufficient reason to impose a grade separation funding condition. *See, e.g.*, FEIS at 4-8, 4-12. While SEA and the Board considered the individual characteristics of each grade crossing and used "a host of factors" in formulating its mitigation recommendations, Final Decision at 44, SEA was consistent in not recommending a grade separation unless, as a result of the Transaction, that crossing would, among other criteria, meet or exceed either: (a) the exposure threshold (calculated by multiplying ADT by the number of trains per day) of 1,000,000, which indicates a significant safety risk; or (b) the capacity threshold (indicated by a change to LOS rated E or F). *See generally* FEIS at 4-10 to 4-22.<sup>14</sup> Unlike the crossings that were deemed to warrant (or potentially warrant) grade separation, Barrington's crossings did not meet either of these objective criteria, and Barrington has made no claim, much less a showing, that those criteria were wrongly applied by SEA.<sup>15</sup>

Both crossings for which the Board imposed grade separation conditions, Ogden Avenue, with an exposure of 1,821,345, and Lincoln Highway, with an exposure of 999,905, met or

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<sup>14</sup> Even as to the issue of increased vehicular delay, which is the sole subject of Barrington's 2011 Study, Barrington's own evidence undermines its claim that its crossings are indistinguishable from the Ogden Avenue crossing. As revised, that study shows Ogden Avenue's increase in total vehicle delay (114 hours per day) is over 16% greater than that at Northwest Highway (98 hours). *See* Andres S.V.S., Attachment 1.

<sup>15</sup> Although, Civiltech's study is largely beside the point, it is nonetheless instructive that when Civiltech corrected its study to account for the fact that crossings in Barrington are not blocked by trains as long as Civiltech had assumed, its model showed that such reductions not only failed to improve Barrington's traffic delay problems, but made them worse overall. Barrington's conclusion that CN bears greater responsibility for traffic delays by reason of reductions in rail crossing delays defies reason. *See* Rebuttal at 14-15 (CWT "has created a two-headed monster" such that "Barrington now believes it would be appropriate for CN to be required to pay the full cost of a grade separation"). Barrington also has not provided any analytic or factual basis for its (apparent) novel theory that imposition of a grade separation condition at Northwest Highway may be justified by cumulating vehicular delay with Hough Street.

exceeded the Board's threshold of 1,000,000.<sup>16</sup> The crossings in Barrington, however, fell far short of the exposure threshold: Northwest Highway has an exposure of 689,165 (or 623,210 as calculated using the inputs in the Civiltech study) while Hough Street has an exposure of 457,745 (462,840 using the Civiltech inputs).<sup>17</sup> In fact, the Barrington crossings had less total exposure than four other substantially affected crossings with more than 40 hours of daily delay: Western Avenue in Park Forest (781,057), Chicago Road in Chicago Heights (739,124), Broad Street in Griffith (731,993), and Montgomery Road in Aurora (1,071,675).<sup>18</sup> As in Barrington, no grade separation funding condition was mandated at those crossings.

Barrington's further claim that the Northwest Highway crossing is as deserving of a separation as the Lincoln Highway crossing because the VOBTOA study found that significant queues could develop at various Barrington intersections during peak hours is similarly without merit. *Andres S.V.S.* at 6; *see also* *Andres* Attachment 1. As noted above, Lincoln Highway

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<sup>16</sup> *See* FEIS App. A.11, at 440-41 (total exposure is the product of the ADT and trains per day shown. The Board reasonably treated the crossing at Lincoln Highway as having met the threshold requirement, Final Decision at 43, n.93, since it was 99.99% of the way to doing so. Mr. Andres's table (*Andres S.V.S.*, Attachment 1) misleadingly treats Lincoln Highway as failing to meet the exposure threshold.

<sup>17</sup> *See* FEIS App. A.11, at 439 (FEIS numbers); 2011 Study at 10 & Table IX-1 (Civiltech reduced ADT at Barrington). Barrington's far lower projected total exposure is largely a result of the fact that both projected total and increased rail traffic levels due to the Transaction are much lower at the two Barrington crossings than at Ogden Avenue or Lincoln Highway. The Barrington crossings are projected to have 20.3 trains per day at each crossing, versus 39.5 at Ogden Avenue, 34.2 at Lincoln Highway, 42.3 at Woodruff Road, and 28.3 at Washington Street. Other substantially affected crossings which did not receive any mitigation (let alone a grade separation) would also experience higher post-transaction rail traffic than Barrington: Western Avenue (31.6 trains/day), Chicago Road (31.6 trains/day), and Broad Street (37.4 trains/day). *See id.* at 441. Moreover, the Barrington crossings are projected to experience a much smaller increase in total rail traffic due to the Transaction (15 trains per day versus 23.8 at Ogden Avenue, 24 at Lincoln Highway, 23.8 at Woodruff Road, and 21.9 at Washington Street). *Id.* at 439-41.

<sup>18</sup> *See id.* at 440-41. Montgomery Road met the delay threshold and exposure criterion, but because Ogden Avenue would be a nearby grade separated alternative, SEA did not recommend it for an additional grade separation. FEIS at 2-43.

met the Board's exposure criterion, while it is undisputed that Northwest Highway (and Hough Road) did not. Barrington's crossings were more like the crossing at Old McHenry Road, which qualified as "substantially affected" based on meeting both the 40-hour per day total vehicle delay threshold and the queue length threshold. Like Old McHenry Road, the two crossings in Barrington received signage mitigation to address potential issues related to excessive queuing. Again, Barrington was not treated disparately.

Similarly, there is no basis for Barrington's suggestion that Northwest Highway merits a grade separation by analogy to the Woodruff Road and Washington Street crossings in Joliet, as to which SEA indicated it would have "evaluated and recommended mitigation" (not necessarily grade separations) but for a VMA between Joliet and CN. *See* FEIS at 4-9. Barrington argues that Northwest Highway is like the Joliet crossings that had high projected total traffic delay, but did not meet the Board's exposure criterion. But Barrington fails to mention (or show in the table submitted as Attachment 1 to the Andres S.V.S.) that SEA specifically found that the two crossings in Joliet were strong candidates for a grade separation based on the fact that they were the only two substantially affected crossings to meet the Board's long-established crossing LOS criterion to qualify for a grade separation condition. *See* FEIS-4-9. Here, as is the case of each of Barrington's claims of disparate treatment, Barrington was not treated disparately; Barrington's facts were different.<sup>19</sup>

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<sup>19</sup> The weakness of Barrington's disparate treatment argument is further revealed by examining the flawed table submitted by Barrington in support of that argument as Attachment 1 to the Andres S.V.S. The table misstates facts, omits critical information, and overstates other information to make a comparison appear more favorable to Barrington than it is. Most significantly:

- It incorrectly shows Lincoln Highway as not having met the Board's total exposure threshold, when the Board found that it had;



Having failed to show that it received disparate treatment, and having failed to show that it met the Board's criteria for a grade separation funding condition, Barrington has not met the minimum test for asserting error, much less material error.

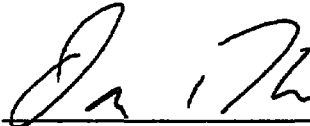
## **CONCLUSION**

Barrington does not and cannot justify an exception to the Board's well-established rule against filing replies to replies. Accordingly, its request to file Rebuttal should be denied and its further evidence and argument stricken from the record. If, however, Barrington's Rebuttal is accepted, then CN's response should be accepted to close the record.

CN's response explains why Barrington's Rebuttal adds nothing material to its Petition, which in turn added nothing material to the points Barrington earlier made or waived before the Board and the D.C. Circuit. Accordingly, Barrington's Petition should be denied.

- 
- It omits the fact that Washington Street and Woodruff Avenue in Joliet met the critical crossing LOS criterion that was the basis for SEA finding that, absent a VMA, it would have evaluated and recommended mitigation at those crossings;
  - It does not reveal that the Northwest Avenue and Hough Street crossings in Barrington both fail to meet the critical crossing LOS criterion;
  - It omits many other crossings that, even without relying on Barrington's much broader measure of vehicle delay, met the Board's "substantially affected" threshold of 40 hours of total vehicular delay per day, yet did not warrant a grade crossing condition.

Respectfully submitted,



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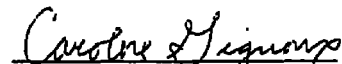
*Counsel for Canadian National Railway Company  
and Grand Trunk Corporation*

December 5, 2011

### **CERTIFICATE OF SERVICE**

I certify that I have this 5th day of December, 2011, caused a true copy of the foregoing CN's (1) Reply to Motion of Village of Barrington for Leave to File Rebuttal to CN's Reply to Petition Seeking Imposition of Additional Mitigation and (2) Response to Barrington Rebuttal (designated as CN-2), to be served by e-mail upon:

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Caroline M. Gignoux